



## TOWN COUNCIL – AGENDA REQUEST FORM

THIS FORM WILL BECOME PART OF THE BACKGROUND INFORMATION USED BY THE COUNCIL AND PUBLIC

Please submit Agenda Request Form, **including back up information, 8 days prior** to the requested meeting date. **Public Hearing requests must be submitted 20 days prior to requested meeting date to meet publication deadlines** (exceptions may be authorized by the Town Manager, Chairman/Vice Chair).

### MEETING INFORMATION

Date Submitted: December 29, 2014

Date of Meeting: January 8, 2015

Submitted by: Town Council Chairman Nancy

Harrington

Department:

Time Required: 15 minutes

Speakers: Nancy Harrington

Background Info.

Supplied:

Yes: ☒

No: ☐

### CATEGORY OF BUSINESS (PLEASE PLACE AN "X" IN THE APPROPRIATE BOX)

Appointment: ☐

Recognition/Resignation/  
Retirement: ☐

**Public Hearing:** ☐

Old Business: ☒

New Business: ☐

Consent Agenda: ☐

Nonpublic: ☐

Other: ☐

### TITLE OF ITEM

Noise Ordinance Concept

### DESCRIPTION OF ITEM

Request for consideration of a noise ordinance.

### REFERENCE (IF KNOWN)

RSA:

Warrant Article:

Charter Article:

Town Meeting:

Other:

N/A

### EQUIPMENT REQUIRED (PLEASE PLACE AN "X" IN THE APPROPRIATE BOX)

Projector: ☐

Grant Requirements: ☐

Easel: ☐

Joint Meeting: ☐

Special Seating: ☐

Other: ☐

Laptop: ☐

None: ☐

### CONTACT INFORMATION

Name: **Nancy Harrington**

Address: **6 Baboosic Lake Road**

Phone Number

Email Address: **nharrington@merrimacknh.gov**

### APPROVAL

Town Manager: Yes ☐ No ☐

Chair/Vice Chair:

Yes ☒ No ☐

Hold for Meeting Date: \_\_\_\_\_



**From:** Matthew H. Upton [<mailto:MUpton@dwmlaw.com>]  
**Sent:** Tuesday, December 16, 2014 10:53 AM  
**To:** Eileen Cabanel  
**Subject:** Noise Ordinances

Eileen:

My experience with noise ordinances has not been positive. Most of the problems stem from the difficulty to enforce. Here is a list of problems associated with them where they have been tried.

1. You can't regulate noise at the source or by type if on private property.
2. While some communities have tried regulating noise emanating from the property line, this requires delicate (read expensive) noise measurement equipment and lots of training.
3. Atmospheric conditions can impact resonance. This can result in inconsistent readings even if the readings are taken shortly after the suspected violation.
4. Some construction noise has to be tolerated (must restrict enforcement during hours of 10PM - 8:00AM).
5. Emergency vehicles have to be exempted.
6. Most noise is intermittent. A noise ordinance creates an expectation that the noise will be regulated. However, the Town cannot reasonably dedicate personnel for extended periods of time to monitor for borderline noise.
7. Ordinances often use words to describe noise in terms which render the ordinance unenforceable as they are void for vagueness or are over broad.
8. Particularly difficult to monitor or enforce noise which is mobile (boom boxes in cars and motorcycles).
9. The most offensive noises are in the lower frequencies. If you set the threshold based upon a single decibel reading it may not be appropriate for all frequencies.
10. In order for a law to be enforceable, a person making the noise must have a way to know what is permitted versus prohibited conduct.
11. While the use of the A-Scale on the decibel meter best matches the human ear, it does not measure lower frequencies as well.
12. The more complicated the ordinance, the more likely it will be challenged as not providing the average person with information necessary to avoid a violation.

For these reasons most communities have stayed away from specific noise ordinances or really do not enforce the laws they have on the books. Unless you have a pervasive problem, I would not encourage the adoption of an ordinance. Most complaints relate to dogs which the legislature has sought to regulate as creating a public nuisance. See RSA 466:31.





believes, all have agreed upon. Councilor Koenig stated his comments were based on the entirety of the discussion of the Council. He stated his point was to bring back the fact there is a need and a reality. We can't just say we weren't happy so we will walk away from this. It has to be resolved.

**MOTION made by Councilor Koenig and seconded by Councilor Dwyer to proceed with the intent to place the issuance of bonds for the highway garage on the ballot in April**

#### **ON THE QUESTION**

Councilor Koenig noted the motion is made with the understanding the information that comes back to the Council may cause it to reconsider.

#### **MOTION CARRIED**

**4-3-0**

*Councilors Mahon, Harrington, and Woods voted in opposition*

Councilor Koenig volunteered to serve on the committee.

#### **New Business**

##### **1. Noise Ordinance Proposal**

*Submitted by Steven Tomasso*

To request a noise ordinance (specifically to roosters) to be incorporated in our Town ordinances and/or regulations.

Mr. Steven Tomasso spoke of being before the Council a few weeks prior in reference to very noisy roosters. He spoke of the level of frustration that resulted from weeks of trying to deal with a neighbor to eliminate the noise, to no avail. He approached the Police Department and was informed there was no means of enforcement, e.g., ordinance. He also approached the Town Manager and was informed there is no means of enforcement. As a result, he is seeking assistance from the Town Council. He stated he has asked for nothing more than control of the noise, specifically with regard to roosters.

Mr. Tomasso spoke of the previous public speaker and information she provided. He spoke of the level of frustration he and his family has endured, their inability to utilize their deck/yard beginning at 5:00 a.m. and the continual noise of a rooster throughout the day. He stated it was the level of frustration that resulted in the language he put forward as a proposed ordinance. He stated a willingness to discuss/debate. He noted the proposed language includes captions from noise ordinances in Manchester and Nashua, which he believes would satisfy the issue.

Mr. Tomasso commented there are a few in Town who own roosters and are keeping them quiet. However, there are others that have roosters causing this disruption to quality of life for the surrounding residents with the knowledge there is no consequence. He stated the desire for an ordinance to be adopted in some fashion. Councilor Rothhaus questioned whether there were other difficulties experienced prior to the rooster issue. Mr. Tomasso responded there were issues with dirt bikes and motorcycle noise a few years back.

Councilor Koenig commented he did not see an ordinance in the draft language provided. He noted there are a lot of thoughts included, some of which go a little to the extreme. He noted a letter received

from Bob McCabe, Chairman of the Agricultural Commission stating the Commission would not endorse this type of ordinance. What he is not clear about is whether the position of the Commission is based upon specific language suggested, the extent, or if there is a compromise that could be reached. Councilor Koenig noted an ordinance such as this could impact all of the small farmers, etc. in Town, and the Council needs to understand the far reaching impact.

He remarked there have been discussions of noise ordinances in the past, and it has always been extremely difficult to determine how to manage something like that and the subsequent impacts. He stated he was open to discussion although believes some of the language suggested by Mr. Tomasso to be extreme. He questioned, of the information provided, what language was being suggested for the ordinance. Mr. Tomasso responded the two sentences that are bolded are what he was proposing for language. The remaining information was intended as backup. Councilor Koenig stated his opinion that is clearly not enough information for the Council to be able to enforce anything.

Mr. Tomasso reiterated his willingness to compromise on language. He added, if the Council does nothing more than complement the existing noise ordinance for barking dogs, he would be very pleased. Councilor Koenig noted roosters are not the only problem with respect to birds. There is the need to ensure the Council does not discriminate or limit itself to the point where it will have to continually amend the ordinance for angry hens, hawks, etc.

Councilor Dwyer if the language: "No person shall: keeping of any animal or bird by which causing frequent or long continued noise shall disturb the comfort or repose of any person in a neighboring premises." were codified in ordinance, should the police be called they could make a judgment call; is it a dog that is barking for 6 hours straight, did the crow just crow at 5:30 a.m. and has not been heard from since, etc.

Chairman Harrington noted the lack of consequence. Vice Chairman Mahon agreed what was presented as a draft ordinance is a collection of thoughts. He remarked this goes back to difficulties experienced in the past with other noise ordinance proposals. The issue comes down to who makes a judgment, how that judgment is made, and what the sanction is. Chairman Harrington commented any proposed language should be vetted by the police department. Vice Chairman Mahon noted counsel would determine whether or not it would be legally enforceable.

Councilor Rothhaus spoke of noise complaints in the past relative to construction noise. He understands Mr. Tomasso's interest is in a noise ordinance to address roosters; however, if addressing the issue of noise, it should be comprehensive and all encompassing. Noise ordinances have been discussed in the past, and are a mighty task to bring to conclusion and result in a document that is enforceable. Councilor Koenig remarked it seems like a somewhat trivial thing; put a statement in that says don't have noisy animals on your property or something like that, but it becomes much more complicated. He provided the example of what has occurred with the sign ordinance, it is incredible how difficult it is to get some to agree this is an enforceable and actionable ordinance. He agreed there would need to be involvement by the police department and legal counsel.

Mr. Tomasso questioned how to go about accomplishing the task. Councilor Dwyer stated a member of the Council would have to motion to form a sub-committee. That motion would have to be seconded and pass by a majority vote of the Council. Once a sub-committee is in place its deliberations would take several months. At conclusion, the sub-committee would make a

recommendation to the Council for consideration. Vice Chairman Mahon suggested the process could be as simple as directing the Town Manager to contact the Town Attorney to develop a draft ordinance for consideration by the Council.

Mr. Tomasso questioned how he would persuade the Council to take such action. Councilor Rothhaus stated he would require input from the Town Manager prior to making a decision on moving forward particularly in light of the magnitude of the task. He remarked legal counsel could be asked to prepare something, but it would likely be basic or perhaps boilerplate from another community. He suggested review of noise ordinances adopted by communities with similar characteristics as Merrimack. Councilor Dwyer suggested such ordinances are rare in towns in New Hampshire.

Councilor Rothhaus reiterated a desire to receive input from the Town Manager. Councilor Dwyer stated he is not opposed to seeking input from the Town Manager and having a further discussion once that input has been received. Chairman Harrington stated the Council would seek advice from the Town Manager regarding feasibility, e.g., what would be involved in such an effort. Director Micali requested clarification if the Council was seeking information on a comprehensive ordinance or one specific to a particular noise. It was suggested recommendations be provided as to whether an ordinance should be all encompassing or specific to this particular issue, and what would be involved in developing an ordinance. Chairman Harrington stated her only parameter is that comparisons be with a comparable community.

Vice Chairman Mahon reminded the Council of a planned absence of the Town Manager. Chairman Harrington stated the Council would have to await her return. Vice Chairman Mahon suggested a request be made for a legal opinion, providing parameters, backup information, and concerns with utilizing language found in city ordinances as opposed to a comparable town.

***The consensus of the Council was to seek a legal opinion.***

Councilor Koenig stated his belief the Council would not be able to incorporate language suggested with regard to grandfathering. Councilor Rothhaus stated he takes issue when a use was in place prior to an ordinance prohibiting it. He remarked he does not believe that to be the particular situation being discussed as he believes Mr. Tomasso has resided at his location longer than the use he is opposed to. Mr. Eber Currier, Agricultural Commission, stated taxpayers pay for the UNH Cooperative Extension. George Hamilton works for the Cooperative Extension and is an advisor who visits local farms. Mr. Currier suggested the individuals contact Mr. Hamilton to see if he can be of assistance. His contact information is 641-6060. Mr. Currier stated his belief Mr. Hamilton would be able to come out and inform those involved of how to properly address the noise the roosters are making. He suggested this route be considered as opposed to developing a noise ordinance for the Town. He remarked Gale McWilliam Jellie, Director, Department of Agriculture, has stated a desire for the Town to be cautious, and if establishing a noise ordinance to be specific about it, e.g., addressing only the noise roosters are making as opposed to noise from farming equipment, etc.

Mr. Currier commented in the 30 years he has been farming in Merrimack, this is the first time he has heard of a noise from a fowl impacting another neighbor. Should the Council determine the need for an ordinance, he requested it be restricted.



Wendy Thomas, 10 Wildcat Falls

Stated surprise with Mr. Currier's remarks regarding it being a rare occasion for complaints to be received. That is contrary to her experience. With the popularity of backyard poultry, more and more people are getting roosters. A lot of the times they have a rooster and don't even know they have it. By the time they find out it is a rooster it has become a pet. With respect to Mr. Tomasso, a rooster crows to warn the flock, e.g., at night if there is a dog walking by the coop the rooster will crow, if a skunk walks by the rooster will crow, if a branch falls on the coop the rooster will crow, etc. She commented she has had roosters, and it sounds and feels like somebody is putting a drill into your head. Roosters are a problem when in close proximity to neighbors.

Peter Gagnon, Agricultural Commission, commented he does not believe the issue has been clearly established to be related to agriculture in the sense that agriculture is a permitted use in the Town of Merrimack and is governed by State law (RSA 21:34-a). Anyone growing or selling products has to meet certain State standards. In order to maintain licenses with the State individuals are required to take courses and be certified every 3 years.

He stated his opinion what is before the Council is an issue of land use or nuisance ordinances. If it were to become an issue of agriculture, language within the zoning ordinances speaks to change of land to one or more agricultural use as defined herein or the expansion of an existing agricultural use shall be subject to non-residential site review by the Planning Board. The language dates back to the late '80s when the laws were established. Any existing use that is agricultural must conform to best management practices dealing with noise, smoke, odor, applications of pesticides, etc.

Chairman Harrington questioned if what was being suggested was that if someone were to obtain a flock of chickens that puts them into a situation where they would have to come before the Planning Board, and was informed that is not what was being stated. Mr. Gagnon noted additional language included in the Zoning Ordinance, which reads: "No use of any kind shall be permitted in any district, if it in any way would be injurious, noxious, or offensive by way of odor, fumes, smoke, dust, vibrations, noise, light, or other objectionable features or if it would be hazardous to the community on account of fire or explosion or any other cause. The Planning Board shall adopt such standards and regulations as it may deem necessary in order to help ascertain conformance with the above regulations."

The regulations have been applied to blasting, stone crushing, noises that were affecting neighborhoods, etc., and have been successful. He stated the Town does have regulations. The regulations address the issue quite comprehensively. Standards can be adopted in accordance with that, which would be enforceable under the Town zoning ordinances.

Chairman Harrington questioned if what was being suggested was that it would be wise for Mr. Tomasso to speak with the Community Development Department in terms of existing regulations? Mr. Gagnon responded there is an issue that seems to surface that the Town of Merrimack does not have noise regulations, and the fact is it does through its zoning ordinances. Councilor Dwyer agreed with the comments made; however noted there is no enforceability. Although Mr. Gagnon is



technically right that prohibitions are identified within the zoning ordinance, there is no enforcement aspect.

Vice Chairman Mahon remarked that is not quite true, and provided the example of blasting conducted for the outlet malls. The Planning Board was quite active in dealing with the constraints and went to great lengths during the site review process to determine some pretty detailed methodologies on how they would determine whether or not the blaster was within the established requirements. Councilor Dwyer noted that was taken on as a separate construction zone project. Vice Chairman Mahon stated that came under the purview Mr. Gagnon was discussing; that they have control over. Councilor Dwyer noted the fire department enforced the requirements. Vice Chairman Mahon stated the fire department is the regulator of that in the Town. Complaints went through the fire department.

He remarked as the language states “adopt such standards and regulations as it may deem necessary in order to help ascertain conformance with the above regulations.” he wonders how they will deal with farm animals; what standards and regulations might they have to deal with that. While there are applications in the zoning ordinances where they do have some control and authority over them, it is not as all-encompassing as some might think. When asked if he agreed with the statements, Mr. Gagnon responded not exactly, the reason being the board developed standards and regulations to address noise; had to wrestle with the issue of decibels, the distance between where the noise is coming from, etc. When asked where those standards could be found, Mr. Gagnon stated the standards are referenced in the regulations. Chairman Harrington questioned whether the best advice to Mr. Tomasso would be to pursue the matter with zoning rather than through a noise ordinance.

Mr. Gagnon stated that could be. He pointed out this has no direct relationship to an agricultural use so it is a non-conforming use that is creating noises or situations in a neighborhood.

Mike Malzone, 8 E. Chamberlain Road

Stated he has had noise issues, and has been before the Council begging for help. He has been to the Planning Board at the initial planning stages to beg for help. He has been to the Zoning Board and Community Development. Nobody can help you in the Town if there is a noise problem. He offered to volunteer on a committee should one be formed. He stated there to be no place for residents to go to address what is a serious problem. He pleaded with the Council to speak with the Town Manager to see if some type of generic noise ordinance could be brought forward.

Councilor Rothhaus commented he is aware of Mr. Malzone’s situation and had brought it to the attention of the Community Development Department. The storage facility across from his home was working all weekend long, in the middle of the night, etc. He was told in order for enforcement to occur, the prohibition would have had to have been discussed and put in the site plan process.

Mr. Malzone stated the company had huge lights lighting up the whole neighborhood while they were pouring concrete and sheet metal at 2:00 a.m., and nobody could do anything about it. Councilor Rothhaus remarked they could not stop them. Most of the information Mr. Gagnon provided refer to restrictions placed when a project is going through the site plan process. There is no way the Community Development Department will enforce the rooster crowing at any time.

